

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNE S. ROZELLE and U.S. POSTAL SERVICE,
POST OFFICE, Lehigh Valley, Pa.

*Docket No. 96-2124; Submitted on the Record;
Issued October 9, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective May 27, 1995.

This case has been on appeal previously.¹ The Office accepted appellant's claim for an acute lumbosacral sprain. On the first appeal, the Board reviewed an August 30, 1988 decision by which the Office found that the report of Dr. Robert Gunderson, a Board-certified orthopedic surgeon, resolved the conflict in the medical evidence as to whether appellant was totally disabled due to her February 18, 1986 employment injury. The conflict was between the July 8, 1988 opinion of appellant's treating physician, Dr. James Butcofski, a Board-certified family practitioner, that appellant was totally disabled due to chronic lumbar strain syndrome and herniated disc disease at the C4-5 level and the May 6 and July 30, 1986 opinions of Dr. Martin D. Blidner, a Board-certified internist, that appellant could perform sedentary work for four hours and gradually increase her work activities. In his December 29, 1986 opinion, Dr. Gunderson opined that appellant had recovered from her February 18, 1986 employment injury but also placed restrictions on appellant. In its decision, the Board found that appellant failed to meet her burden of proof in establishing a causal relationship between her federal employment and her cervical condition. The Board also found that the Office failed to meet its burden of proof in terminating benefits because Dr. Gunderson did not qualify as an impartial medical specialist having been designated one after he examined appellant. Further, he did not explain why appellant needed restrictions if she had recovered from her February 18, 1986 employment injury.

The Office subsequently referred appellant to an impartial medical specialist, Dr. Joseph R. Sgarlat, a Board-certified orthopedic surgeon, who in his October 12, 1989 report opined that there were no objective findings to support appellant's ongoing complaints of pain,

¹ *Joanne S. Rozelle*, 40 ECAB 931 (1989). The facts and history surrounding the prior Board appeal is forth in the respective decision and is hereby incorporated by reference.

that appellant could return to her usual work, and although he placed restrictions on appellant, he stated they were not related to her February 18, 1986 employment injury. By decision dated January 19, 1990, the Office terminated benefits stating that the medical evidence establishes that the February 18, 1986 employment injury had resolved. Appellant requested a hearing before an Office hearing representative which was held on January 2, 1990.

By decision dated March 18, 1991, the Office vacated the Office's January 19, 1990 decision on the grounds that Dr. Sgarlat was not an impartial medical specialist because he had examined appellant prior to his October 12, 1989 examination of appellant, and reinstated payment of appellant's compensation.

The Office subsequently referred appellant to a second opinion physician, Dr. Stephen I. Lester, a Board-certified orthopedic surgeon, who on August 30, 1991 considered appellant's history of injury, performed a physical examination, reviewed current x-rays of the spine which were normal and reviewed an October 1987 magnetic resonance imaging (MRI) scan which showed a cervical disc problem at C4-5. He diagnosed chronic lumbosacral strain syndrome and stated that appellant was partially disabled and placed bending and lifting restrictions on her. Dr. Lester noted that the effects of her work injury were chronic. He stated that although the MRI scan showed a disc problem at C4-5 which appellant felt was related to the February 18, 1986 employment injury, appellant was only being treated for her back.

In a report dated June 16, 1992, Dr. Butcofski reiterated his diagnosis of herniated nucleus pulposus, cervical and lumbar in nature, and stated that appellant was totally disabled, and that he strongly disagreed with Dr. Lester's evaluation form.

In a report dated October 18, 1993, Dr. Lester diagnosed chronic lumbosacral strain syndrome related to the lifting injury. He stated that the MRI scan revealed disc herniation at C4-5 and stated that he failed to see a relationship between the cervical disc and the February 18, 1986 employment injury. Dr. Lester stated that appellant's subjective complaints were not substantiated by the physical findings. He opined that appellant was partially disabled and could work with lifting and bending restrictions. Dr. Lester opined that her problem was "primarily a pain problem." He disagreed with Dr. Butcofski's opinion.

To resolve the conflict between Dr. Butcofski's opinion that appellant was totally disabled and Dr. Lester's opinion that appellant was partially disabled, the Office referred appellant to an impartial medical specialist, Dr. James H. Wiley, a Board-certified orthopedic surgeon. In a report dated February 3, 1995, Dr. Wiley considered appellant's history of injury, performed a physical examination, reviewed the October 1987 MRI scan which showed a normal dorsal and lumbar spine and a small protrusion at the C4-5 area in the cervical spine and reviewed x-rays showing mild sclerosis in the right sacroiliac joint. He diagnosed cervical spine pain, thoracic spine pain and lumbar spine pain and stated that the findings of the diagnostic tests included discogenic disease at C4-5. Dr. Wiley opined that the effects of the February 18, 1986 employment injury had ceased and said he could not state whether appellant's cervical condition was work related, although having the original x-rays taken at the time the injury occurred would be helpful. He opined that appellant was able to perform sedentary work.

By decision dated May 17, 1995, the Office terminated compensation stating that the evidence of record established that appellant's disability resulting from the February 18, 1986 employment injury had ceased as of May 27, 1995.

Appellant requested an oral hearing before an Office hearing representative which was held on April 3, 1996. Appellant also submitted additional medical evidence consisting of a report from Dr. Butcofski dated March 28, 1995. In his report, Dr. Butcofski examined appellant and stated that he remembered that appellant complained of back pain which included the cervical spine during her employment. He stated that he sent appellant to some other doctors because she was not improving and they agreed with him that she had cervical disc disease which was worse than her lower back pain and that she had disc damage in the C4-5 area and was experiencing upper extremity pain. He stated that he recommended that appellant seek permanent disability and doubted that appellant would be able to work in the future. In his office note dated March 28, 1995, he diagnosed cervical and lumbar disc disease, noted his physical findings, and opined that appellant was unable to work.

At the hearing, appellant testified that following the February 18, 1986 employment injury, she was treated for cervical pain, upper back pain and arm pain. Appellant testified that she tried to return to work after her injury but was unable to work. Appellant further testified that in the past couple of years, her condition had worsened and that she felt increased numbness in her leg and increased weakness in her lower back. Appellant stated that it was the same kind of pain that she had since 1988. Appellant also stated that she had difficulty driving, lifting objects and performing household chores.

In a report dated April 30, 1996, Dr. Butcofski stated that the original x-rays showed that appellant had severe degenerative joint disease in the cervical and lumbar area, which did "impact on her general condition." In his attached office notes dated March 28, 1996, Dr. Butcofski performed a physical examination and reiterated his diagnosis of lower back problems and stated that appellant was disabled due to her back pain.

By decision dated June 11, 1996, the Office hearing representative affirmed the Office's May 17, 1995 decision.

The Board finds that the Office properly determined that appellant recovered from her acute lumbosacral strain on May 27, 1995.

Once the office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.³

² *Patricia M. Mitchell*, 48 ECAB ____ (Docket No. 95-384, issued February 27, 1997); *Patricia A. Keller*, 45 ECAB 278 (1993).

³ *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

In the present case, in his June 16, 1992, March 28, 1995 and April 30, 1996 reports, Dr. Butcofski, a Board-certified family practitioner and appellant's treating physician, opined that appellant was totally disabled due to her herniated nucleus pulposus or degenerative joint disease which was cervical and lumbar in nature. In his March 28, 1995 report, he stated that he remembered appellant complaining of back pain which included the cervical spine. In his April 30, 1996 report, Dr. Butcofski stated that the original x-rays showed that appellant had severe degenerative joint disease in the cervical area as well as the lumbar area and this impacted on her condition.

In his August 30, 1991 and October 18, 1993 opinions, Dr. Lester diagnosed chronic lumbosacral strain syndrome related to appellant's February 18, 1986 employment injury but opined that appellant was partially disabled and could work with restrictions. In his October 18, 1993 opinion, he noted that the October 1987 MRI scan showed a cervical disc herniation at C4-5 but failed to see a relationship between the cervical disc and the February 18, 1986 employment injury.

To resolve the conflict in the medical evidence between Dr. Butcofski's and Dr. Lester's opinions as to whether appellant was totally disabled due to her February 18, 1986 employment injury, the Office referred appellant to Dr. Wiley, an impartial medical specialist and a Board-certified orthopedic surgeon. In his February 3, 1995 report, Dr. Wiley diagnosed cervical, thoracic and lumbar spine pain and stated that the effects of the February 18, 1986 employment injury had ceased apparently because he found no objective evidence of a lumbar problem. He stated, however, that he could not state whether appellant's cervical condition was work related and that a review of the original x-rays taken at the time of the February 18, 1986 employment injury would be helpful.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴ In the present case, in his February 3, 1995 report, Dr. Wiley found no objective evidence of a lumbar problem and opined that appellant had recovered from the February 18, 1986 employment injury and could perform sedentary work. His opinion is sufficiently well rationalized to establish that appellant had recovered from her acute lumbosacral strain and as such constitutes the weight of the evidence. Further, the burden is on appellant to establish that her cervical disease is work related.⁵ Since, in his February 3, 1995 report, Dr. Wiley stated that he could not determine whether appellant's cervical disease was work related and that the original x-rays taken at the time of the February 18, 1986 injury would be helpful, his report is insufficient to establish that appellant's cervical disease is related to her employment. Appellant did not submit sufficient evidence to establish that she had a work-related cervical disease.

⁴ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

⁵ *See Daniel J. Overfield*, 42 ECAB 718, 721 (1991); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 11, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 9, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member